MURPHY HESSE TOOMEY & LEHANE LLP
Attorneys at Law

Labor and Employment Alert
December 2017

National Labor Relations Board Overturns Important Decisions Related to Bargaining and Union Organization

The National Labor Relations Board ("NLRB" or "Board") has overturned two important decisions from the prior administration affecting bargaining obligations and bargaining unit composition under the National Labor Relations Act ("NLRA"). These decisions, issued on the eve of the Board Chairman's term expiring, are significant for employers with a unionized work force or in the context of union organizing campaigns.

Clarification of Bargaining Obligations in Relation to Established Past Practice

On December 15, 2017, in a 3-2 decision (*Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017)), the Board clarified bargaining obligations for employers in the context of an expired collective bargaining agreement. Specifically, the Board overturned *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) ("*DuPont*"), which had held that actions consistent with an established past practice constitute a change – and therefore required the employer to provide the union with notice and an opportunity to bargain prior to implementation – if the past practice was created under a management-rights clause in a collective bargaining agreement that has expired, or if the disputed actions involved employer discretion.

In its ruling, the Board concluded that an employer's changes to employee healthcare benefits in 2013 were simply a continuation of its past practice, as similar unilateral changes were made at the same time every year from 2001 to 2012. In this context, the Board found the company did not violate the NLRA by failing to give the union advance notice and the opportunity to bargain prior to making changes.

In doing so, the Board noted the consistency of its decision with past Board cases, and held that actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions. The Board held that this principle applies regardless of whether (i) a collective bargaining agreement (CBA) was in effect when the past practice was created, and (ii) no CBA existed when the disputed actions were taken. In overturning *DuPont*, the Board also noted that actions consistent with an established practice do not constitute a change requiring bargaining merely because they may involve some degree of discretion. The Board's reversion to its prior standard reinstates longstanding law, allowing employers to take unilateral action in accordance with established past-practice without committing an unfair labor practice.

Phone (617) 479-5000 **Fax (617) 479-6469**
www.mhtl.com

Labor and Employment Alert
December 2017

Board Overturns "Micro-Unit" Ruling

In another 3-2 decision on December 15, 2017 (*PCC Structurals, Inc.*, 365 NLRB No. 160 (2017)), the Board overruled its controversial decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) ("*Specialty Healthcare*"), reinstating its "community-of-interest" standard for determining appropriate bargaining units.

Under the *Specialty Healthcare* standard, if a union petitioned for an election among a specific group of employees and those employees shared a community of interest among themselves, but the employer took the position that appropriate unit should actually be larger (for example, a wall-to-wall unit comprising all employees), the Board would not side with the employer unless the employer was able to show that the excluded employees shared an "overwhelming" community of interest with the union's petitioned-for group. In short, *Specialty Healthcare* made it significantly more difficult for employers to oppose smaller, more costly, bargaining units (so called "micro-units") – such as, for example, individual departments or divisions within the company.

In its December 15, 2017 decision, a micro-unit was challenged by the employer, which was seeking a wall-to-wall unit of all employees. In its decision, the Board abandoned the "overwhelming" community-of-interest standard of *Specialty Healthcare* and remanded the case for further consideration of the appropriate unit. In doing so, the Board stated that "there are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees—both those within and those outside the petitioned-for unit—without regard to whether these groups share an 'overwhelming' community of interests."

This Alert was prepared by Attorney Kier Wachterhauser.
He may be reached at (617) 479-5000.

****

Phone (617) 479-5000 Fax (617) 479-6469
www.mhtl.com